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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975
No. 74-954

UNITED STATES OF AMERICA,
ex rel. HENRY F. COBELL,

Respondent,

-vs-

THE HONORABLE JOHN P.
SHARP and THE BLACKFEET
TRIBAL COURT,

Petitioners.

AMICUS CURIAE BRIEF OF THE STATE OF MONTANA

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AMICUS CURIAE BRIEF OF THE STATE OF MONTANA

The State of Montana files this amicus brief for the reasons that the legal issues presented directly affect the Department of Social and Rehabilitation Services, State of Montana, and in particular, its Division of Child Welfare Services which handles custody of children, adoptions, youth in need of care, guardianships and an absent parent child support program. Which courts have jurisdiction and which courts do not in said matters will directly affect all of the above programs and involve the custody and best interests of many, many children in the State of Montana and elsewhere.

The department is faced with many cases where a parent and, in particular, Indian parents, obtain divorces in state district courts and later apply for aid to dependent children benefits through the State Department of Social and Rehabilitation Services. Some attempt to evade this responsibility by returning to the Indian Reservation

and claiming that the Indian courts will not enforce state court custody orders and the related question of jurisdiction.

This brief is filed pursuant to Rule 42, Rules of the Supreme Court, 28 U.S.C., Appendix, page 7694.

POSITION OF AMICUS

The State of Montana, as Amicus Curiae, takes the position that the respondent, Henry F. Cobell, should prevail and the Petition for a Writ of Certiorari to the United States Supreme Court should be denied.

STATEMENT OF THE CASE

Joan R. Cobell and Henry F. Cobell were married on October 17, 1963, at Cardston, Alberta, Canada. They are Indians and are both enrolled members of the Blackfeet Tribe. Two children were born of that marriage, to-wit, Rodney Dale Cobell and Venetta Lynn Cobell. The two children contain some Indian blood, but insufficient blood to be considered as enrolled members of the tribe. In fact, they are not enrolled members of the Blackfeet Tribe and, because of the percentage of Indian blood, they cannot become enrolled members of the Blackfeet Tribe.

In August, 1971, while the couple were residents of Great Falls, Montana, Joan R. Cobell filed for divorce in the state District Court of the Eighth Judicial District, in and for the County of Cascade, Montana. The couple had been residents of Montana for more than a year preceding the commencement of the divorce action. In her complaint, besides asking for a divorce, Joan R. Cobell asked that the court grant her the care, custody and control of the two minor children, and she asked for child support payments.

On October 21, 1971, Henry F. Cobell answered the

allegations to the complaint on file in the state district court and counterclaimed, requesting that the court grant him a divorce, and he asked for the care, custody and control of the two minor children.

The issues were joined and a hearing was held on the merits. On December 22, 1971, with both sides consenting to the jurisdiction of the court, the district court granted to both Joan R. Cobell and Henry F. Cobell a divorce, each from the other. The court also declared that the defendant, Henry F. Cobell, was a fit and proper person to have the care, custody and control of the two minor children and it granted him the temporary custody of the children. The court further ordered that the Court of Conciliation of the Eighth Judicial District of the State of Montana should make an immediate study of the needs of the children and the type of home each of the parties were able to provide for the said children, and asked the Court of Conciliation to secure the assistance of the Mental Hygiene Clinic in this regard.

Subsequent to that order, the plaintiff, Joan R. Cobell, petitioned the court for an order changing the custody of the two minor children to plaintiff, Joan R. Cobell. On August 14, 1972, without a hearing, the court ordered the minor children to be in the temporary custody of Joan R. Cobell. A show cause hearing was set for the 14th day of September, 1972, regarding the change of the said custody from Henry F. Cobell to Joan R. Cobell. However, the state District Court, without affording the defendants due process or any substantive hearing, granted the temporary custody of the two minor children to the plaintiff, Joan R. Cobell.

On September 19, 1972, Mr. Cobell petitioned the Montana Supreme Court for a Writ of Prohibition, asking

relief from that court and for an order rescinding the District Court's order granting to Joan R. Cobell the temporary custody of the two minor children. On September 19, 1972, the Montana Supreme Court issued a show cause order to the state District Court to appear on September 28, 1972, and to show cause why Mr. Cobell should not receive the relief he prayed for. Subsequent to the show cause order being issued, the state District Court deleted from its order of September 14, 1972, that portion relating to changing the custody to Joan R. Cobell. Accordingly, the temporary custody of the two children remained with Henry F. Cobell.

In the meantime, Joan R. Cobell took the two children to Browning, Montana, which is located on the Indian Reservation. When the order of the Montana Supreme Court came down, Mrs. Cobell took the two children out of the public school system in Browning, Montana, and disappeared for approximately three weeks.

By order of the state District Court dated September 26, 1972, the said District Court reinforced its order that the custody of the two minor children should be with their father, Henry F. Cobell, and that Joan R. Cobell should immediately return the two children to their father. The court also issued orders to the sheriff and his deputies to insure that the provisions of the order were complied with. Joan R. Cobell refused to comply with the order and continued to refuse to obey the order of the Montana Supreme Court and the state District Court. On October 11, 1972, the state District Court issued a warrant of attachment for the arrest of Joan R. Cobell, setting bail in the sum of one thousand and no/100 dollars ($1,000.00).

On or about October 6, 1972, through an order drafted by an attorney at law and signed by Judge John Sharp,

the Blackfeet Tribal Court asserted temporary care, custody and control over the two minor children and ordered them not to be removed from the Blackfeet Indian Reservation. This is a case of first impression on the Blackfeet Indian Reservation.

It is undisputed that both of the parents voluntarily submitted themselves to the jurisdiction of the state District Court of the Eighth Judicial District of Montana in order to have their marriage dissolved and to have the issue of the care, custody and control of the two minor children determined.

Joan R. Cobell was served with the petition for writ of habeas corpus and order to show cause in this matter on October 18, 1972. She failed to honor said documents and did not appear at said hearing held on October 25, 1972.

ARGUMENT SUMMARY

The three major issues at hand are:

1. Jurisdiction of the Federal District Court in this habeas corpus proceeding.

2. The lack of jurisdiction of the Blackfeet Tribal Court in the matter.

3. The jurisdiction of the Montana courts.

Other issues raised by petitioners herein are:

1. Whether this is a proper case for ruling that a person aggrieved by an order of the Indian Tribal Court must exhaust available Tribal Court remedies before seeking a writ of habeas corpus from the United State District Court.

2. Whether Indian Tribal Courts must give full faith

and credit to state court judgments where the state courts do not recognize judgments rendered by Indian Tribal Courts, but where the litigants, as enrolled Indians, consent to the jurisdiction of the state court.

3. Whether the Blackfeet Indian Nation properly transferred jurisdiction over marriage and divorce and related matters to the courts of the state of Montana.

4. Whether the Tribal Court could assume jurisdiction over non-enrolled Indian children found on the Blackfeet Indian Reservation.

JURISDICTION OF FEDERAL DISTRICT COURT IN THIS HABEAS CORPUS PROCEEDING

The Federal District Court has jurisdiction over this matter under the provisions of 25 U.S.C., Section 1303. It states:

> "The privilege of the Writ of Habeas Corpus shall be available to any person, in a Court of the United States, to test the legality of his detention by order of an Indian Tribe."

The United States District Judge in his opinion faced the question of whether one person could invoke the writ in regard to other persons, to-wit, the father invoking the writ in regard to his children. He stated:

> "Here, there is an additional question: That is, the right of this petitioner to contest the custody of one other than himself.
>
> "That there is non-identity of the petitioner with the person subject to the allegedly

> unlawful custody presents no obstacle to decision. The father of minor children, where he is the custodial parent, necessarily has standing to question the detention of his children."

LACK OF JURISDICTION OF THE BLACKFEET TRIBAL COURT IN THE MATTER

The Tribal Council's jurisdiction is one of limitation. Article 6, Section 1(k) of the Constitution and By-laws for the Blackfeet Tribe of the Blackfeet Indian Reservation reads as follows:

> "To promulgate ordinances for the purposes of safeguarding the peace and safety of residents of the Blackfeet Indian Reservation, and to establish minor Courts for the adjudication of claims or disputes arising amongst the members of the tribe, and for the trial and punishment for members of the tribe charged with the commission of offenses set forth in such ordinances."

It is obvious that the jurisdiction of the Tribal Council does not extend to matters involving non-members of the Blackfeet Tribe. The children, in the case at hand, are non-enrolled members of the Blackfeet Tribe. This is exhaustively briefed by Appellee before the Ninth Circuit Court of Appeals, on pages 6, 7, 8 and 9.

Here the parties to the litigation definitely submitted to the jurisdiction of the state court. The state court acted and issued its order on custody. The Tribal Court then stepped in and said, we're going to take over and issue a temporary order on custody until you come up with an

order that we would consent to. The Tribal Court, in effect, is acting as an appellate court over the state District Court. This is not the function of an Indian Tribal Court. To allow it to do so will cause havoc, uncertainty and injustice in many child custody cases. It would cause a multiplicity of suits, a crowding of court calendars and an unwarranted restraint over the state District Courts by the Tribal Courts. The United States Supreme Court should definitely delineate that party litigants in such situations cannot run to a Tribal Court and attempt to have the custody decision of a state District Court overturned.

JURISDICTION OF MONTANA COURTS

The Constitution of the State of Montana, Article VII, Section 4, gives the District Courts in the state original jurisdiction in all cases at law and in equity, which includes divorce actions. Before a person can obtain a divorce, he or she must be a resident of the state for one year next preceding the commencement of the action. (Section 21-134, R.C.M. 1947, as amended.) In addition, Section 21-138, R.C.M. 1947, mandates that the court's jurisdiction is continuing as far as child custody matters are concerned, until such child reaches the age of an adult. In fact, the Montana Supreme Court has held that it is improper to terminate custody at a hearing on contempt for non-support when respondent had not been given notice that custody would be at issue. See *State ex rel. Shelhamer v. District Court*, 159 Mont. 11, 494 P.2d 928. There is an obvious lack of due process where one of the parties is not given notice or even is present to defend himself when a change of custody matter is considered.

It is important to note that the appellants have never questioned the jurisdiction of the state District Court in the

matter at hand.

It is difficult to improve upon the reasoning of Circuit Judge Trask in his opinions reported in Appendix A of the Petition for Writ of Certiorari, starting on page 37. Judge Trask stated:

> "Thus, by *voluntarily* invoking the state court's jurisdiction for divorce purposes, the Cobells clearly submitted the question of their children's custody to the judgment of the Montana state courts. Moreover, Montana, like the majority of states, views its jurisdiction in custody matters as continuing, *Barbour v. Barbour*, 134 Mont. 317, 330 P.2d 1093 (1958), and unaffected by the removal of the children from the state, *Butts v. Collins*, 129 Mont. 61, 289 P.2d 949 (1955)."

EXHAUSTION OF REMEDIES THROUGH THE TRIBAL COURT

It is difficult to follow the argument of petitioner that Mr. Cobell had not exhausted his remedies before the Indian Tribal Court. Judge Battin, the U.S. District Judge, noted in his memorandum, opinion, order and judgment, found in Appendix B of Petition for a Writ of Certiorari, starting on page 47:

> "As noted in the previous order, Judge Sharp testified before this court that it was his intention not to rescind his order, that he had issued it for purposes of testing his jurisdiction, and that he did not expect it changed except by order of a Federal Court. From his testimony, it is the opinion of this court

> that the petitioner had no effective remedies available to him in Tribal Court. Whatever remedies may have existed were effectively curtailed by the entrance of the order which the court has heretofore held invalid. That remedies are available in theory, but not in fact, is not synonymous with failure to exhaust remedies. That ineffective and meaningless procedures were available to petitioner does not preclude his seeking a writ of habeas corpus."

The law does not demand the doing of a useless act.

Circuit Judge Trask, in his opinion, starting on page 34 of Appendix A to the Petition for a Writ of Certiorari, comments on the exhaustion of tribal remedies as follows:

> "Unlike the general habeas corpus statute directed against unlawful state custody (28 U.S.C., Section 2254), there is no express exhaustion requirement contained in the specialized writ which is involved in this contorversy, 25 U.S.C., Section 1303. . . . Likewise, we do not believe that the District Court here erred when it concluded that Henry Cobell lacked meaningful remedy in the tribal courts. First, the restraining order issued by Judge Sharp contained no invitation to participate in tribal appellate processes. Rather, the *ex parte* order, although designated as 'temporary', spoke with a tone of finality. . . ."

THE ISSUE OF FULL FAITH AND CREDIT BETWEEN TRIBAL COURTS AND STATE COURTS

Petitioner confuses the issue by trying to argue the

question of full faith and credit between Tribal Courts and state District Courts. As stated above, the Tribal Court in this case is attempting to act like an appellate court over the state District Court. It has issued an ex parte order denying due process to Henry Cobell, reversing the order of the state District Court and stating that its order will remain until the state District Court changes its ruling to support the feelings of the Tribal Court. The Tribal Court in this case simply did not have jurisdiction. The enrolled tribal members, the plaintiff and defendant, the parents of the children, voluntarily consented to the jurisdiction of the state District Court. That court has acted, and now one of the parties runs to the Tribal Court and, without a hearing on the merits, attempts to have the order reversed, claiming that it has jurisdiction over the Indians on the reservation, but the two children are not enrolled members of the tribe and cannot be because of their lack of the required percentage of Indian blood.

DID THE BLACKFEET INDIAN NATION PROPERLY TRANSFER JURISDICTION OVER MARRIAGES AND DIVORCES AND RELATED MATTERS TO THE COURTS OF THE STATE OF MONTANA?

This should be answered in the affirmative. The power of the Indian Tribal Courts is clearly spelled out, and this court should so hold. The Blackfeet Tribal Court is a court of "limited jurisdiction." Chapter 1, Section 1, clearly refers to criminal offenses which are enumerated in Chapter 5 of said code. Chapter 2, Section 1, clearly limits jurisdiction to members of the tribe. The children in this particular action are non-enrolled members of the tribe. Nowhere in the code or in any federal law or in the United States Constitution are the Tribal Courts given jurisdiction over marriage and divorce and related matters.

THE TRIBAL COURT COULD NOT ASSUME JURISDICTION OVER THE CHILDREN IN THE CASE AT HAND AND ISSUE AN ORDER INCONSISTENT WITH AN OUTSTANDING STATE COURT DECREE CONCERNING THE CUSTODY OF THE CHILDREN

Petitioner erroneously states that the fourth issue is whether the Blackfeet Tribal Court could assume jurisdiction over Blackfeet Indian children found on the Blackfeet Indian Reservation. The facts of the case are that the children are not enrolled Blackfeet Indian children and they cannot become enrolled Blackfeet Indian children. They lived off the reservation and were in the public school system and were brought to the Indian reservation by their mother, contrary to the order of the state court. The Blackfeet Tribal Court does not have jurisdiction over these children, and this court should so hold.

SUMMARY AND CONCLUSION

The State of Montana, Amicus Curiae, supports the position of the father, Henry F. Cobell. Unless clearly defined guidelines are set forth in the jurisdiction of custody of children in divorce and marriage and related matters, irreparable damage will be done to many children. There will be a constant flood of litigation of one court overruling another court, of no one knowing for sure which order to obey, children will be snatched from one jurisdiction and one state court to Tribal Courts, to reservations. The State of Montana basically attempts to protect the interests of the children. Most of the arguments which have gone before in this case have centered around the rights and best interests of the father and of the mother, and even of the grandmother; but we would argue that this court should look to the best interests of the children, and that would dictate well-

defined limits of jurisdiction and guidelines for both the Tribal Courts, the state courts, and the United States court to follow in child custody matters.

For these reasons, we respectfully ask that this court uphold appelle's position and deny the Petition for Writ of Certiorari.

Respectfully submitted this 12th day of May, 1975.

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AFFIDAVIT OF SERVICE

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I, Thomas H. Mahan, one of the attorneys for the State of Montana, Amicus Curiae, herein, depose and say, that on the 12th day of May, 1975, I served the foregoing Amicus Curiae Brief of the State of Montana upon the parties herein by depositing full, true and correct copies (3 copies to each) thereof in the United States mail, postage prepaid, addressed as follows:

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